IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1206

BRUCE A. LATSHAW,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

BRUCE A. LATSHAW, your petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Pennsylvania, entered in the above entitled matter on October 6, 1978.

OPINIONS BELOW.

On October 6, 1978 the Supreme Court of Pennsylvania, by a 4 to 3 vote, filed a judgment (App. A, *infra*, p. A1), affirming the judgment of the Court of Common Pleas of Centre County Pennsylvania. The Supreme Court's majority and dissenting opinions (App. B, *infra*, pp. A2-A17) are officially reported at — Pa. —, 392 A. 2d 1301 (1978). The Superior Court of Pennsylvania had, on September 27, 1976, by a 5 to 2 vote, affirmed the convic-

tion and sentence. The Superior Court's opinions (App. C, *infra*, pp. A19-A26) are officially reported at 242 Pa. Super. 233, 363 A. 2d 1246 (1976). The opinion and order of the trial judge, denying motions for a new trial and arrest of judgment, entered on April 8, 1975 (App. D, *infra*, pp. A27-A29) have not yet been officially reported.

JURISDICTION.

The order of the Supreme Court of Pennsylvania (App. A, *infra*, p. A1), affirming the judgment and sentence, was entered on October 6, 1978. On December 27, 1978, Mr. Justice Brennan extended the time for filing this petition[1] up to and including February 3, 1979 (App. E, *infra*, p. A31). This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3).

QUESTION PRESENTED.

Where the owner of a farm rents a portion of her farmhouse to a relative, permitting the relative to use a barn near the house for storage, and the relative in turn permits a friend to store footlockers and other sealed containers in that barn for a fee, without the express consent and knowledge of the owner, does a warrantless search of the barn and of the contents of the footlockers and sealed containers by police acting with permission of the owner of the farm, violate the reasonable expectation of privacy of the owner of the footlockers and sealed containers guaranteed by the Fourth Amendment?

1. Through inadvertence the petition was captioned "Bruce A. Latshaw, Petitioner v. United States of America, Respondent". The proper party Respondent is the Commonwealth of Pennsylvania, not the United States of America. As specified in the certificate of service appended to that petition, a copy thereof was served on the District Attorney of Centre County, not on the Solicitor General of the United States or the United States Attorney.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment of the United States Constitution provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment of the United States Constitution provides in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law; . . ."

STATEMENT OF THE CASE.

Petitioner was charged with possession of a controlled substance with intent to manufacture or deliver said controlled substance, in violation of the Pennsylvania Drug, Device and Cosmetic Act of 1972.[2] He filed a pre-trial motion to suppress evidence. When the case was called

2. 35 P. S. § 780-113(a)(30) provides:

(a) The followig acts and the causing thereof within the Commonwealth are hereby prohibited;

. . .

(30) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance by person not registered under this act, or a practitioner not registered or licensed by the appropriate State board . . .

Under subsection (f) the penalty involving marijuana, which is a Schedule I non-narcotic controlled substance, is a felony with a maximum imprisonment not exceeding 5 years, or fine not exceeding $15,000, or both.

for trial, the petitioner waived a jury trial, and the trial judge, before commencing trial, heard testimony on the motion to suppress. After denying the motion, the court immediately commenced trial, finding petitioner guilty as charged. The trial judge subsequently denied post-verdict motions and sentenced petitioner to pay the cost of prosecution, undergo imprisonment for not less than one month nor more than 23 months, and to pay a fine of $2,500.00. A timely appeal followed. The Superior Court, with 2 judges dissenting, affirmed the conviction and sentence. The Supreme Court allowed an appeal, and, with 3 Justices dissenting, also affirmed the conviction and sentence.

From the evidence elicited on the motion and at trial,[3] it appears that Minnie Bubb was the sole owner of a farm in Centre County. Her niece was married to Robert Hinds and since 1972 she orally rented to Mr. and Mrs. Hinds one side of her farmhouse for $100 per month, which included utilities, while she lived in the remainder of the farmhouse. Ms. Bubb never made any specific lease, written or oral, relating to the barn which was located about 25-30 yards from the house, but she did permit relatives to store articles and utilize portions of the barn for some time. Prior to her marriage, Mrs. Hinds had kept a horse in the barn, and following her marriage, the couple kept a goat there and parked their car under the barn. Without the knowledge, permission, or consent of Minnie Bubb, Robert Hinds gave permission to petitioner Bruce Latshaw to store things in the hayloft of the barn for $75 per shipment. Hinds explained to Ms. Bubb the

3. At the trial on the merits, the trial judge apparently utilized evidence which had been elicited in connection with the motion, even though the prosecutor failed to move to incorporate that testimony. However, no objection was made by defendant's counsel, and no issue relating to this matter was raised on appeal by appellate counsel, who was different than trial counsel.

presence of Latshaw and others by informing her that they were college students who were planting a garden and were doing something for a term paper. No one ever told Hinds that the shipments were marijuana, but on one occasion he saw what he believed to be marijuana on the premises. One week before the seizure, Ms. Bubb noticed on her brother's truck parked outside the barn greenish material resembling weeds which she suspected to be marijuana. She discussed it with her brother and sister-in-law, and a week later the latter climbed into the loft and discovered a brown paper bag which further confirmed their suspicion. Her sister-in-law then called the police to investigate. When they arrived approximately 10 p.m. in the evening, Ms. Bubb invited them to search the barn and to take the contents that they found there. No consent was sought or obtained from either Hinds or Latshaw.

The police subsequently took and opened 7 cartons which they found to contain 9 or 10 bags each, and 2 footlockers which contained a scale, shears, nets, binoculars, masking tape, cord and similar equipment. The contents of the bags were analyzed to be marijuana.

Later that night or the next day they arrested Robert Hinds and charged him with possession of a controlled substance with intent to deliver. Based on information supplied by Hinds, a few days later they obtained an arrest warrant for Latshaw but they did not attempt to serve that warrant or arrest him at that time. Several months later, in September, 1973, they interrogated Latshaw but he denied knowledge of the items, and they did not serve the arrest warrant. It was not until April 3, 1974, after they continued to negotiate with Hinds promising him lenient disposition of charges against him if he would cooperate, that they finally obtained a promise of cooperation, and arrested Latshaw. He was tried and convicted largely on the basis of the testimony of Hinds, and this appeal followed.

REASONS FOR GRANTING OF THE WRIT.

This Court, just a few weeks ago, in *Rakas v. Illinois*, — U. S. — , 58 L. Ed. 2d 387 (1978), has redefined the circumstances under which a person aggrieved by a warrantless search of premises belonging to a third person may object to the admission at trial of evidence discovered during that search. Justice Rehnquist, speaking for the majority, refused to broaden the doctrine of standing enunciated in *Jones v. United States*, 362 U. S. 257 (1960), to encompass any criminal defendant at whom a search is directed. The majority also rejected the alternative holding of *Jones* that anyone legitimately on the premises at the time of the search could object.

Instead, the majority shifted the focus to a determination of whether the disputed search and seizure infringes upon an interest of the defendant which the Fourth Amendment was designed to protect. 58 L. Ed. 2d, at 399. The Court interpreted *Jones* to stand for the proposition that a person can have a legally sufficient interest in a place other than his own home, so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place, and adheres to the view expressed in *Jones*, and echoed in later cases, that arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control. [The Court cited *Jones v. United States, supra*, at 266; *Mancusi v. DeForte*, 392 U. S. 364 (1968); *Warden v. Hayden*, 387 U. S. 294 (1967); and *Silverman v. United States*, 365 U. S. 505 (1961).]

The Court concluded that *Katz v. United States*, 389 U. S. 347 (1967), provides guidance in defining the scope of the interest protected by the Fourth Amendment, when it concluded that the capacity to claim the protection of the Fourth Amendment depends not upon a property right

in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

In *United States v. Chadwick*, 433 U. S. 1 (1977), also cited by the Court as an example of the legitimate expectation of privacy, this Court ruled improper the warrantless search without consent of a locked footlocker which had been seized from the open trunk of a parked automobile during the arrests of those who were in possession of the footlocker at the automobile's location outside a train terminal.

The case at bar carries the inquiry one step further. Here two footlockers and other sealed cartons were stored in a barn with the permission of a tenant of the farm who had legitimate permission to use that barn for storage purposes. Even though the tenant did not receive specific permission to "sublet" the barn,[4] neither was there any specific restriction imposed by the landlord on the tenant's right to permit someone else to use that barn for storage purposes. Thus, in many respects this case is one step removed from *Chadwick*—here the footlockers and containers were in a fixed location, rather than in the trunk

4. The trial court, in the case at bar, based its denial of the Motion to Suppress in large part on the fact that the tenant, Hinds, had no authority to make any clandestine deal with the defendant to utilize the hayloft in the upper portion of the barn, and that, therefore, the defendant is a trespasser who would have no standing to raise constitutional rights with respect to the search and seizure. The majority opinion of the Superior Court concluded that Hinds had only a gratuitous license to use part of the barn, and that the owner was a joint user of the structure who could consent to a search. That opinion also suggested that the barn was in the exclusive control of the owner, who had not leased it to anyone, and her consent to search her property waived the requirement of a search warrant. The dissenters noted that the owner's power to consent to the search of the barn was limited, and she could not consent to the search of the areas over which she had no authority, including the hayloft, the footlockers and sealed cartons. The dissenters thus rejected the reliance of the majority and of the lower court on archaic property concepts.

of an automobile. Does this factual distinction give rights to any less expectation of privacy than this Court held was reasonable in *Chadwick?* Three members of the Pennsylvania Supreme Court (with a fourth concurring in the result), in interpreting the Fourth Amendment requirement, concluded that when the owner of the farm gave her voluntary permission to search the barn, since there was no governmental coercion, this validated her consent and distinguished *Bumper v. North Carolina,* 391 U. S. 543 (1968); *Go-Bart Reporting Co. v. United States,* 282 U. S. 384 (1931); and *Amos v. United States,* 255 U. S. 313 (1921). These members of the Court also concluded that the owner did not lose the right to control the use of the barn even though her actual use of it was limited and infrequent. Therefore, these members of the Court concluded that the owner of the containers had no reasonable expectation of privacy as to the contents of the containers, since he could expect that a person possessing common authority over the *premises* may consent to the search of the *effects* of an absent, non-consenting person with whom that authority is shared. The Court relied for support for that proposition on *United States v. Matlock,* 415 U. S. 164 (1974). However, it should be noted that *Matlock* involved a different issue. In that case, police arrested a bank robbery suspect in front of the house in which he lived. Without a warrant, they immediately entered the house with the permission of a woman whose parents were the lessees of the house, and who lived in the upstairs bedroom with the defendant. The question was whether out-of-court statements by that woman were admissible to prove the woman's relationship to the defendant and the bedroom in determining whether her consent to search the room was valid against the defendant.

The majority of the Court alternatively suggested that several Circuit Court decisions, specifically *United States v. Diggs,* 544 F .2d 116 (3rd Cir. 1976) and *United States v. Botsch,* 364 F. 2d 542 (2nd Cir. 1966), stand for the proposition that a search authorized by a third party who has a legitimate interest in exculpating himself or herself from possible criminal involvement with suspected contraband is a reasonable search within the Fourth Amendment. It should be noted, however, that even if those cases stood for that proposition,[5] it is inapplicable here, since there was no suggestion that the owner of the property, Minnie Bubb, was in any way involved in any illegal activity, nor did she suggest at any time that she felt she was attempting to exculpate herself from any crime.

The three dissenting Justices concluded that even if the appellant had no reasonably expectation that persons with lawful access to the barn would not visit the hayloft, it could not be concluded that the officers' warrantless opening of the storage containers was lawful. In other words, the dissenters noted that the majority had indulged in a non-sequitor: a person possessing common authority over *premises* may not necessarily consent to the search of the *effects* of an absent, non-consenting person with whom the authority over th. premises is shared. The dissenters noted that the majority opinion is contrary to the decision of this Court in *Chadwick* as well as to two recent decisions of the Supreme Court of Pennsylvania,

5. At least one concurring judge in the *Diggs* case felt that a narrower version of the rule announced in *Botsch* should be adopted by limiting the scope of the bailee's authority to consent to a search or seizure of defendant's property to the scope of his authority under the terms of the bailment (as was suggested by the dissent in *Botsch*). The dissent in *Diggs* suggested that Reverend Bradley's anxiety to see the contents of the box in that case did not stem from a concern for his own legal position. Reverend Bradley's interest in purging himself of any possible taint ceased to operate once he notified the authorities of the existence of the locked box, explained the circumstances surrounding his possession of it, and physically turned it over to government agents.

Commonwealth v. Platou, 455 Pa. 258, 312 A. 2d 29 (1973) and *Commonwealth v. Silo*, — Pa. — , 389 A. 2d 62 (1978).

Platou is very close on its facts to the case at bar. Appellant in that case was a guest in the apartment of his friend, Robert Wander. Police, possessing an arrest warrant for Wander and a search warrant for his premises, arrested him at his place of work and took him to his apartment. As they approached the apartment, Wander informed the police that he had a friend visiting him. When they entered, appellant claimed the two suitcases on the floor of the apartment were his. Despite being on notice that the suitcases did not belong to Wander, the police began searching them simultaneously with their initiating a search of the apartment. In one of the suitcases they found an ounce of marijuana. The Court held the search of the suitcases under authority of the search warrant for the apartment invalid, analogizing to situations in which consent searches have been invalidated because of the place or thing searched was in the exclusive control or possession of a known consenting party, and the consenting party did not have an independent right of his own to consent to the seizure. As noted by the dissenting Justices in the case at bar, neither in the case at bar nor in *Platou* did the person subjected to the warrantless governmental intrusion relinquish any reasonable expectation of privacy in their belongings.

Likewise, the dissenters pointed out that the majority ignored the *Silo* case, where a hospital nurse, upon the request of police officers, took defendant's personal effects from the hospital in which defendant was located and turned them over to police. In invalidating the warrantless police seizure, the Court unanimously concluded that the nurse did not have mutual use or joint access or control over Silo's clothing. Any access or control over the

clothing by the nurse were for the purposes of safeguarding these effects, not for the purpose of using them.

Thus, this Court should review the circumstances in the case at bar to determine whether Pennsylvania courts have improperly interpreted the Fourth Amendment's scope and to determine whether the warrantless search and seizure here involved violated petitioner's reasonable expectations of privacy guaranteed by the Fourth Amendment.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted to determine whether the Pennsylvania Courts have improperly interpreted the Fourth Amendment's safeguards over a person's right of reasonable expectations of privacy as to the contents of sealed containers stored on premises as to which the owner of those containers has at least joint access and control.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX A.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 254 January Term, 1977

COMMONWEALTH OF PENNSYLVANIA

v.

BRUCE A. LATSHAW

Appellant

Judgment.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS OF CENTRE COUNTY, be, and the same is hereby AFFIRMED.

By THE COURT:

SALLY MRVOS
Sally Mrvos, Esquire
Prothonotary

Dated: October 6, 1978

APPENDIX B.

[J-202]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 254 January Term, 1977

COMMONWEALTH OF PENNSYLVANIA

v.

BRUCE A. LATSHAW,

Appellant

APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA AFFIRMING THE JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CENTRE COUNTY AT No. 265-1974.

Opinion

Filed: October 5, 1978

NIX, J.

We granted an appeal in this matter from an order of the Superior Court at 242 Pa. Super. Ct. 233, 363 A. 2d 1246 (1976), affirming a judgment of sentence based upon evidence which appellant contends was obtained as a result of an unlawful search and seizure. The pivotal question is whether appellant had a reasonable expectation of privacy with respect to the contents of certain closed containers stored inside a barn with the consent of the owner's relative who had a limited right to the use of the barn, where the owner of the barn neither knew nor specifically consented to the storage of such containers. For reasons following, we find that appellant had no reasonable expectation that the contents of the closed boxes and footlockers would not be open to inspection and that the owner of the premises had authority to consent to a search of the closed containers. The order of the Superior Court is hereby affirmed.

In reviewing a suppression court's findings, this Court will consider the evidence of the Commonwealth and so much of the evidence for the defense as, fairly read in the context of the record as a whole, remains uncontradicted. *Commonwealth v. Silo*, — Pa. —, — A. 2d —, slip op. at 2 (filed July 14, 1978), citing *Commonwealth v. Harris*, — Pa. —, — A. 2d —, —, slip op. at 7 (filed June 2, 1978). The court below summarized the testimony as follows:

> "Minnie Bubb was the sole owner of a set of farm buildings which were not used as part of a farming operation. The buildings consisted of a large two-story farmhouse, a woodshed, a shanty, and a large barn, the latter located some 25-30 yards distance from the house. Her niece was married to Robert Hinds, and she rented to Mr. and Mrs. Hinds the one side of the farmhouse for $100 per month, which included utilities. Minnie Bubb resided in the remainder of the farmhouse.
>
> Minnie Bubb never at anytime made any lease, either oral or written, with respect to the barn or any of the out-buildings, but she did from time to time grant permission for relatives to store articles and to utilize lower portions of the barn. Mrs. Hinds kept a

horse in the barn prior to her marriage, and, following her marriage, they kept a goat there and parked their car under the barn. Minnie Bubb also gave permission to a brother to store his tractor, lumber, and a lawn mower in the barn, and allowed him to park his truck outside the barn. She never at anytime gave permission to anyone to use the loft, the haymow, or the upper portion of the barn.

Robert Hinds was a friend of the defendant, Bruce Latshaw. Without knowledge, permission or consent of Minnie Bubb, Robert Hinds gave permission to Bruce Latshaw to store and process shipments of marijuana in the hayloft of the barn for $75.00 a shipment. The presence of the defendant and his co-conspirators was explained to Ms. Bubb by informing her that they were college students who were planting a garden and were doing something for a term paper, and that their presence was necessary as a college requirement.

A week before the search and seizure occurred, Minnie Bubb noticed on her brother's truck, parked outside of the barn, greenish material resembling weeds, which she *suspicioned* [sic.] to be marijuana. She discussed it with her brother and then called in her sister-in-law, Dora Bubb, who climbed into the loft and discovered a brown paper bag which further confirmed their suspicions, and they then called the police to investigate. Not only did Minnie Bubb give permission to the police authorities to search the area, she actually called them and invited them to do so. The police search which followed uncovered 76 pounds of cured marijuana in bags, cartons and footlockers and, in addition thereto, the police discovered dust masks, a 100-lb. hanging scale, a pair of shears,

nets for drying marijuana, a pair of binoculars, masking tape, cord and other processing equipment."

The Fourth Amendment does not preclude a warrantless search of property when consent is given by a person possessing the authority to consent to such search. *United States v. Matlock*, 415 U. S. 164 (1974); *Schneckloth v. Bustamonte*, 412 U. S. 218 (1973); *Bumper v. North Carolina*, 391 U. S. 543 (1968); *Johnson v. United States*, 333 U. S. 10 (1948); *Zap v. United States*, 328 U. S. 624 (1946); *Commonwealth v. Kontos*, 442 Pa. 343, 276 A. 2d 830 (1971); *Commonwealth v. Platou*, 455 Pa. 258, 312 A. 2d 29 (1973); *Commonwealth v. Storck*, 442 Pa. 197, 275 A. 2d 362 (1971). There is no question that Ms. Bubb's consent was voluntarily given and unlike many situations arising in this area, here the police did not seek the permission to search. Thus, the present case is distinguishable from cases in which the government initiated the search, and cases in which there was an element of governmental coercion in obtaining the alleged consent. *See Bumper v. North Carolina, supra; Go-Bart Importing Co. v. United States*, 282 U. S. 344 (1931); *Amos v. United States*, 255 U. S. 313 (1921).

At the outset we note that the standing of appellant to contest the validity of the search has been conceded by the appellee. Since the offense charged included as an essential element, the possession of the seized articles at the time of the challenged search, the concession of this point was indeed appropriate. *Brown v. United States*, 411 U. S. 223 (1973); *Commonwealth v. Treftz*, 465 Pa. 614, 351 A. 2d 265 (1976).

Under the facts of this case, Ms. Bubb's control of the barn cannot be seriously questioned.[1] Nevertheless, ap-

(1) The dissenters in the Superior Court readily admitted Ms. Bubb's right to authorize a search of the barn. Commonwealth v. Latshaw, 242 Pa. Super. Ct. 233, —, 363 A. 2d 1246, — (1976).

pellant argues that since Ms. Bubb's *actual* use of the premises was limited and infrequent, she lost the interest which would permit her to give a valid consent for its search. Custody over and control of a building and its contents is not lost merely because the owner has made only infrequent use of the property where the owner has clearly retained the right of access to and use thereof. *See United States v. Cook*, 530 F. 2d 145 (7th Cir. 1976). At all times Ms. Bubb made evident her intention of retaining all of the indicia of ownership. Mr. Hinds' use of the barn, and that of the other family members, was gratuitous and not pursuant to any type of lease arrangement. Moreover, the permitted uses were not of a general nature but rather explicitly limited. For example, prior to her marriage, Mrs. Hinds was permitted to keep a horse in the barn and after her marriage, she and her husband were allowed to keep a goat and to park their car under the barn. Ms. Bubb allowed her brother to store his tractor, lumber and a lawn mower in the barn. The suppression court found that she did not at any time give permission to anyone to use the loft, the haymow, or the upper portion of the structure. The particularity with which the owner saw fit to grant to others the right to use her property reinforced her control over the property rather than creating an inference of an intention to relinquish that control.

The only serious question presented is whether Ms. Bubb's control over her property vested her with the right to authorize police officials, without a warrant to open and examine the contents of the sealed cartons and locked footlocker that had been placed thereon by another. The answer to this question rests upon a determination as to whether the owner of these containers had a reasonable expectation of privacy as to their contents. The decisions of the United States Supreme Court bearing upon the need to obtain a warrant to authorize a search have been far

from consistent, as even the most cursory review makes evident. There has been language which would suggest that the test is not whether the search was reasonable but rather whether it would have been unreasonable to have required the governmental agency to procure a search warrant before making it. *See e.g. United States v. U. S. Dist. Ct.*, 407 U. S. 297 (1972); *Chimel v. Calif.*, 395 U. S. 752 (1969). However, the prevailing opinions in *South Dakota v. Opperman*, 428 U. S. 364 (1976) appear to focus upon the reasonableness of the search. Furthermore, it has been indicated that a warrantless search is per se unreasonable under the Fourth Amendment. *Cady v. Dombrowski*, 413 U. S. 433 (1973); *Katz v. United States*, 389 U. S. 347 (1967).[2] However, exceptions under the umbrella of exigent circumstances have been well established.[3]

In any event the third party consent exception to the warrant requirement is firmly established. *South Dakota v. Opperman, supra; U. S. v. Matlock, supra; Schneckloth v. Bustamonte, supra; Frazier v. Cupp*, 394 U. S. 731 (1969). The basis for the principle that the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person

(2) Recently, in the decision in Mincy v. Ariz., — U. S. — (decided June 21, 1978), the United States Supreme Court reaffirmed the *Katz* view that warrantless searches are per se unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Id.* at — (slip op. page 4.)

(3) "Exigent circumstances" is a generic term encompassing numerous examples where it would be unreasonable to require law enforcement agencies to obtain a search warrant prior to effecting a search. Thus, warrants have not been required under the following circumstances: a search incident to a lawful arrest, United States v. Rabinowitz, 339 U. S. 56 (1950); hot pursuit of a fleeing felon, Warden v. Hayden, 387 U. S. 294 (1967); emergency requiring the need for immediate action to prevent destruction of evidence, Schmerber v. California, 384 U. S. 757 (1966); and emergency requiring the need for immediate action to prevent evidence, which is easily moveable, from being quickly removed from the jurisdiction, Carroll v. United States, 267 U. S. 132 (1925).

with whom that authority is shared, is discussed at length in *United States v. Matlock, supra.* In *Matlock*, the Court focused upon the joint access or control, "so that it is reasonable to recognize that any of the coinhabitants has the right to permit the inspection in his own right and that the others assume the risk that one of their number might permit the common area to be searched." *Id.* at 171, n. 7.

A close reading of the above quoted language from *Matlock* indicates that the test is not based merely on appellant's subjective expectation of privacy, but rests also on a finding that said expectation was reasonable. In determining what is "reasonable" all the surrounding facts and circumstances must be considered.(4) Here, appellant's purported expectation of privacy is greatly limited by the legitimate interest of Minnie Bubb in the subject property. Accordingly, what distinguishes the present case from other cases which concern the issue of the ability of a third party to consent to a search of the property or effects of another party is the utter lack of any consensual relationship be-

(4) See South Dakota v. Opperman, 428 U. S. 364, 375 (1976). The most familiar expression of a reasonable expectation of privacy, i.e., one which is entitled to protection under the Fourth Amendment, is the test suggested by Mr. Justice Harlan. See Katz v. United States, 389 U. S. 347, 360 (1967) (Harlan, J., concurring):

> "As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a two fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable." *Id.* at 361.

tween Ms. Bubb and the appellant, coupled with the inescapable fact that Ms. Bubb at no time surrendered any indicia of her absolute control over the barn. Relinquishment of this control cannot be implied from mere sporadic permission granted by Ms. Bubb to her tenant and various others for specific uses. As the undisputed owner of the barn, Ms. Bubb had the unimpeded ability to act at will with regard to the contents of the barn. Absent any express or implied consensual understanding with Ms. Bubb, the appellant had no expectation of privacy with regard to the boxes or their contents placed therein. Ms. Bubb's rights thus were superior to the appellant's rights in the barn and its contents. Appellant could not force Ms. Bubb to permit the property to remain in the barn, nor could he impose upon her any custodial duty to protect or otherwise harbor the property.

The record does not reflect what representations Mr. Hinds might have made with reference to his control over the barn.

Nevertheless, while these statements may have been such as to provide a basis for a reasonable subjective expectation of privacy, based upon the facts as they actually existed, the expectation could not be deemed to have been reasonable. The right of an owner of property to request the police to open and examine closed containers upon finding the objects upon her property, which were placed there without her knowledge or consent, particularly where she had reason to believe that they might contain contraband,(5) is indisputable. The fact that Hinds' statements

(5) There have been several circuit court decisions suggesting that a search authorized by a third party, who has a legitimate interest in exculpating himself or herself from possible criminal involvement with the suspected contraband, is not an unreasonable search under the Fourth Amendment. *See* United States v. Diggs, 544 F. 2d 116 (3rd Cir. 1976); United States v. Botsch, 364 F. 2d 542 (2nd Cir. 1966). This theory would also justify the result we reach today

may have been misleading does not vest a constitutional protection in a situation where it obviously would not otherwise exist. The independent right of Ms. Bubb to authorize the search of her property and all items thereon could under no theory have been affected by any representations made by Mr. Hinds to appellant. We therefore hold that the instant search did not violate appellant's right to be free from unreasonable search and seizure.

Order of the Superior Court is affirmed.

Mr. Justice Pomeroy concurred in the result.

Mr. Justice Roberts filed a dissenting opinion in which Mr. Justice O'Brien and Mr. Justice Manderino joined.

Mr. Justice Manderino filed a dissenting opinion.

[202]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 254 January Term, 1977

COMMONWEALTH OF PENNSYLVANIA

v.

BRUCE A. LATSHAW,
Appellant

APPEAL FROM ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA AFFIRMING THE JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CENTRE COUNTY AT NO. 265-1974.

Dissenting Opinion

FILED OCTOBER 5, 1978

ROBERTS, *J.*

The majority concludes that State Police officers lawfully opened, searched, and seized appellant Bruce Latshaw's closed boxes and footlockers and their contents, even though no magistrate ever made an independent determination that probable cause supported the governmental intrusion. The majority justifies today's exception from the well-settled warrant requirement of both the federal and Pennsylvania Constitutions on the theory that

Minnie Bubb, owner of the barn in which the closed boxes and footlockers were found, but not the owner of these storage containers, could "consent" to the officers' opening of the containers. I dissent.

Minnie Bubb called police to investigate the possibility that marijuana was being stored on her premises. After police arrived at the farm, she gave the officers a plastic bag containing a substance resembling marijuana. Bubb had found the substance in the hayloft of her barn. With the help of Bubb, the officers found the closed boxes and footlockers in the hayloft. With her permission they opened them. Five days later, police arrested Robert Hinds and charged him with possession of marijuana. Hinds and his wife, Bubb's niece, lived on the farm, renting and sharing with Bubb the nearby farmhouse. Police then arrested appellant Bruce Latshaw. Appellant had stored the closed boxes and footlockers pursuant to an agreement with Hinds, who Bubb permitted to store articles in the barn.

Even were it assumed, as the majority concludes, that appellant could harbor no reasonable expectation that persons with lawful access to the barn would not visit the hayloft, it cannot be concluded that the officers' warrantless opening of appellant's storage containers was lawful. Nothing in the record demonstrates that Minnie Bubb, or any other person, shared access to appellant's closed storage containers. Indeed, Minnie Bubb placed the officers on clear, unmistakeable notice that she had no interest in the storage containers. Thus, while appellant might have risked that persons with lawful access to the barn would find and view his storage containers, he did not in any respect give up the privacy interest manifested upon closing the boxes and footlockers to the outside world.

United States v. Chadwick, — U. S. —, 97 S. Ct. 2476 (1977), dispels any doubt concerning the reasonableness

of appellant's expectation of privacy in his closed boxes and footlockers he stored in Minnie Bubb's barn. There, federal narcotics agents without a warrant opened a footlocker the respondents were publicly transporting. Mr. Chief Justice Burger, speaking for the Court, invalidated the warrantless governmental intrusion. He stated:

> "By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides."

Id., — U. S. at —, 97 S. Ct. at 2476. The Court rejected any notion that respondents' public exposure of the footlockers vitiated the reasonableness of respondents' expectation of privacy. "[T]he Fourth Amendment 'protects people, not places,' *Katz v. United States*, 389 U. S. 347, 351, 88 S. Ct. 507, 511 (1967); more particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, — U. S. at —, 97 S. Ct. at 2481.

Commonwealth v. Platou, 455 Pa. 258, 312 A. 2d 29 (1973), compels the conclusion that the officers' warrantless opening of the closed storage containers violated the fourth amendment and the Pennsylvania Constitution. In *Platou*, police had a valid warrant authorizing the search of the apartment of Robert Wander. Upon executing the warrant, the officers found suitcases belonging to Platou. Even though the warrant did not authorize a search of the suitcases, and even though Platou informed

the officers that the suitcases were his, the officers searched their contents. In invalidating the search of Platou's suitcases, this Court concluded:

> "The Fourth Amendment guarantees that '[t]he right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .'[*] A person does not lose the protection of the Fourth Amendment by entering the apartment of another. *Katz v. United States*, 389 U. S. 347, 352, 88 S. Ct. 507, 511 (1967); *Jones v. United States*, 362 U. S. 257, 261-67, 80 S. Ct. 725, 731-34 (1960); *Reece*, supra. Neither do a person's effects. The Fourth Amendment permits no lesser protection for a person's effects, than for his person. So long as a person seeks to preserve his effects as private, even if they are accessible to the public or to others, they are constitutionally protected. *Katz*, supra at 351, 88 S. Ct. at 511. Stated differently, a person must maintain the privacy of his possessions in such a fashion that his 'expectations of freedom from intrusion are recognized as reasonable.' Id. at 361, 88 S. Ct. at 517 (HARLAN, J., concurring).
>
> Personal belongings brought by their owner on a visit to a friend's house retain their constitutional protection until their owner meaningfully abdicates control or responsibility. Appellant's placing his suitcases on the floor of Wander's apartment and opening one of them does not amount to an abandonment of his control. Appellant maintained his reasonable expectation of privacy. And therefore the search of his suitcases was unreasonable and constitutionally impermissible."

Id., 455 Pa. at 266-67, 312 A. 2d at 34 (footnote renumbered).

Both here and in *Platou*, the officers may have lawfully been in a position to observe persons' effects. But in both instances neither person subjected to the warrantless governmental intrusion relinquished any reasonable expectation of privacy in their belongings. In examining Platou's personal effects, police were fully aware they were exceeding the scope of their warrant to search Robert Wander's premises. So too here, the officers knew that Bubb had no control over the contents of the closed cartons. She expressly disavowed their ownership, the storage containers were located in a place where property is not likely to be abandoned, and Bubb made no claim to exclusive control of the barn. No less than in *Platou*, appellant's reasonable expectation of privacy must prevail.

The majority never addresses whether its conclusion is consistent with *Platou*, even though appellant argues that *Platou* is controlling. Moreover, the majority ignores *Chadwick*. Also ignored by the majority is *Commonwealth v. Silo*, — Pa. —, — A. 2d — (J. 269, 1975, filed July 14, 1978). There, a hospital nurse, upon the request of police officers, took the personal effects of Jerome Silo from the hospital in which Silo was located and turned them over to police. In invalidating this warrantless police seizure, this Court unanimously concluded:

> "[T]he narrow issue in the instant case is whether it can be said that the nurse had mutual use and joint

[*] [Footnote 11 in original] "The wording of article I, section 8 of the Pennsylvania Constitution is only slightly different. 'The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures. . . .'" In note 2 of *Platou*, 455 Pa. at 260 n. 2, 312 A. 2d at 31 n. 2, we stated: "Our discussion of the Fourth Amendment is equally applicable to the state constitutional provisions." See *Pennsylvania v. Platou*, 417 U. S. 976, 94 S. Ct. 3183 (1974) (Supreme Court of the United States denying certiorari, "it appearing that the judgment below rests upon an adequate state ground").

> access or control over appellant's clothing. The mere statement of the issue suggests the answer. Although it may be conceded *arguendo* that the nurse had joint access and control to appellant's clothing, there was clearly no right to mutual use of the clothing by the nurse or any other member of the hospital staff. The nurse's access to and control of appellant's clothing were for the purposes of safeguarding these effects, not for the purpose of using them. We therefore reject the argument that the nurse's consent validated the seizure of appellant's clothing."

Id., — Pa. at —, — A. 2d at — (slip op. at 8-9). Like *Platou* and *Chadwick, Silo* is controlling.

In *Chadwick,* Mr. Chief Justice Burger reaffirmed the role of the warrant in our constitutional scheme:

> "[T]he judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States,* 333 U. S. 10, 14 [, 68 S. Ct. 367, 369] (1948). Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.' Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search. *Camara v. Municipal Court,* 387 U. S. 523, 532 [, 87 S. Ct. 1727, 1732] (1967)."

United States v. Chadwick, supra at —, 97 S. Ct. at 2482. Absent proper consent, it must be concluded that, consistent with *Chadwick, Platou, Silo,* and the established law of search and seizure, state police officers' warrantless opening of appellant's closed boxes and footlockers was unlawful under the fourth amendment and Pennsylvania Constitution.

I would reverse judgment of sentence and grant appellant a new trial.

Mr. Justice O'Brien and Mr. Justice Manderino join in this dissenting opinion.

[202]

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 254 January Term, 1977

COMMONWEALTH OF PENNSYLVANIA

v.

BRUCE A. LATSHAW,

Appellant

APPEAL FROM ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA AFFIRMING THE JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CENTRE COUNTY AT NO. 265-1974.

Dissenting Opinion

FILED: OCTOBER 5, 1978

MANDERINO, *J.*

I join in the dissent of Mr. Justice Roberts but would note further that the majority's analysis seems to be based upon an assumption that it is the property owner's constitutional rights which we are to protect rather than the accused's. To say that the accused who left a closed container in a place where he had permission to do so had no expectation of privacy is absurd. Under the majority's reasoning before one can legitimately expect privacy, they would have to hire an attorney to check deeds and leases before leaving an item in a place when a friend says it's all right to do so. Such a conclusion necessarily follows from the result reached today by the majority.

APPENDIX C.

IN THE
SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

No. 1371 OCTOBER TERM, 1975

J. 1681 / 1975

COMMONWEALTH OF PENNSYLVANIA

-VS-

BRUCE A. LATSHAW,

Appellant

APPEAL FROM JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CRIMINAL DIVISION, OF CENTRE COUNTY, AT NO. 265 OF 1974.

Opinion

FILED SEPTEMBER 2, 1976

BY VAN DER VOORT, *J.*:

Appeal is taken to our Court from judgment of sentence rendered following a September 5, 1954, trial before Judge R. Paul CAMPBELL, without a jury. Appellant had been arrested, charged with, and indicted for violation of "The Controlled Substance, Drug, Device and Cosmetic Act", section 13(a)(30).[1] A motion to suppress evidence

1. Act of 1972, April 14, P. L. 233, § 13, 35 P. S. § 780.113 (a)(30).

of criminality seized prior to arrest had been filed and denied prior to trial. Appellant was adjudged guilty and sentenced to pay costs and a fine of $2,500.00 and to undergo imprisonment in the Centre County jail for not less than one nor more than twenty-three months.

The facts show that on or about November of 1972, Miss Minnie Bubb rented a portion of her house to a Mr. and Mrs. Robert Hinds, who are her neice and husband. The lease was oral, in an amount of $100.00 per month including utilities. It is both her and Mr. Hind's uncontradicted testimony that Miss Bubb permitted the Hinds the use of her nearby barn, but that such was gratuitous only and not a part of the lease. In fact, the Hinds as well as others had gratuitously made use of this barn before November of 1972.

Mr. Hinds testified to an arrangement between him and appellant whereby Hinds permitted appellant use of the loft of the barn for storage of certain bulk items, and was paid $75.00 per shipment. It was Hinds' permission alone under which appellant operated.

On or about July of 1973, Miss Bubb, having noticed strangers in and about the barn but making no inquiry, went to the immediate vicinity of that building and spotted a quantity of greenish "weeds". Subsequently, with her sister, she entered the barn, found a paper bag of these "weeds", and called the State Police. Miss Bubb gave her permission to the State Police for them to search the barn, wherein 76 pounds of marijuana (later proved to be so) was found in seven cartons and two footlockers. Other material used in the curing and packaging of marijuana was found and seized.

Appellant now argues that the warrantless search of the barn and consequent seizure should be proscribed for the reason that his permission to use the barn came from a lessee of the structure, which lessee had an expectation

that his use of the building would be protected from warrantless searches. Appellant argues that his rights, as well as interest to contest the search and seizure, stem from lessee Hinds' rights, and he calls himself a guest or invitee of the lessee. Appellant further argues that the lower court erred in opining that the "joint control doctrine" applies in part, i.e., that both Miss Bubb and Hinds had control of the barn to the end that Bubb could grant permission to search. Appellant argues that Miss Bubb never used the structure and thereby had relinquished control of it and consequently had no authority to grant permission to search.

A thorough study of the testimony of this case leads us to the conclusion that Hinds had only a gratuitous license to use part of the barn. Miss Minnie Bubb, owner, never relinquished any indicia of custody or control over the barn. She was clearly within her rights to allow individuals to use the barn and to make whatever arrangements she chose to that end. Not only did she have the right of ownership but also she was a joint user of the structure, and under the authority of *Commonwealth v. Kontos*, 442 Pa. 343, 276 A. 2d 830 (1971), the joint user or custodian can consent to a search. Whatever rights Hinds had to the Fourth Amendment protection of his goods in the barn, or of the goods there subject to his custody, may be lost by means of the consent to search as given by the joint user. *Mancusi v. DeForte*, 392 U. S. 364, 88 S. Ct. 2120 (1968). The facts as well may give rise to the conclusion that the barn was in the exclusive control of Miss Bubb, she not having leased it to anyone. Her consent to search her property thus waives the requirement of a search warrant. The holding of *Commonwealth v. Platou*, 455 Pa. 258, 312 A. 2d 29 (1973), is inapposite in that Miss Bubb did not know who might be the owner of the cartons, footlockers, and material. Where such knowledge is lacking, it is un-

reasonable to expect the police to be able to frame a search warrant. The consent of the owner to the search is valid, as it was in *Commonwealth v. Anderson*, 208 Pa. Superior Ct. 323, 222 A. 2d 495 (1966).

Holding that Miss Bubb's consent to search was valid, and the seizure of contraband proper, we find that Hinds' use of the barn was not such as to give rise to a Fourth Amendment protection against unreasonable search and seizure in him alone. Holding thus, we need not address the further argument as to appellant's standing to raise the issue of allegedly invalid search and seizure.

Judgment of sentence affirmed.

Hoffman, J. files a dissenting opinion in which Spaeth, J. joins.

J. 1681 (1975)

IN THE

SUPERIOR COURT OF PENNSYLVANIA

No. 1371 October Term, 1975

COMMONWEALTH OF PENNSYLVANIA

v.

BRUCE A. LATSHAW,

Appellant

APPEAL FROM THE JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CRIMINAL DIVISION, OF CENTRE COUNTY TO NO. 265 - 1974.

Dissenting Opinion

FILED SEPTEMBER 7, 1976

BY HOFFMAN, *J.*:

The Majority holds that Miss Bubb had the right to authorize a search of the barn located on her Centre County farm. I agree with that conclusion. *Frazier v. Cupp*, 394 U. S. 731 (1969); *Commonwealth v. Kontos*, 442 Pa. 343, A. 2d (1971). Cf. *Commonwealth v. Storck*, 442 Pa. 197, 275 A. 2d 362 (1971); *Commonwealth v. Ellsworth*, 421 Pa. 169, 218 A. 2d 249 (1966). But the Court goes further and concludes that the scope of Miss Bubb's authority was sufficiently broad to permit a search of appellant's closed footlockers and cartons found in the barn. I disagree.

As stated by the Majority, Minnie Bubb rented part of her home to her niece and her niece's husband. She per-

mitted them to use a barn on the premises. In turn, the niece's husband permitted appellant to use the loft of the barn to store boxes and was paid $75.00 "per shipment." After Miss Bubb discovered a suspicious "weed" in a paper sack in the barn, she requested that the State Police investigate and granted them access to the barn. Once in the barn, the police opened several boxes and two footlockers, containing a total of seventy-six pounds of marijuana. After questioning, the niece's husband implicated appellant as the owner of the boxes.

Initially, except for the "weed" discovered in a paper sack by Minnie Bubb which led to her call to the police, this case in no way involves a private search that nets contraband. See *Commonwealth v. Kozak*, 233 Pa. Superior Ct. 348, A. 2d (1975); *Commonwealth v. Eshelman*, — Pa. Superior Ct. — , — A. 2d — (1975) (dissenting opinion by HOFFMAN, J.). Further, Minnie Bubb retained the power to consent to a search of the *barn*, in that she was the owner and joint user of the barn. *Frazier v. Cupp*, supra; *Commonwealth v. Kontos*, supra. That consent, however, was limited. Once in the barn, Minnie Bubb could not consent to a search of areas in which or over which she had no authority.

This conclusion is bolstered by our Supreme Court's decision in *Commonwealth v. Platou*, 455 Pa. 258, 260-62, A. 2d (1973): "At the time of the search appellant was a guest in the apartment of his friend, Robert Wander. On the basis of a sale of marijuana by Wander to a police agent, an arrest warrant for him and a search warrant for his premises were obtained. The police arrested Wander at his place of work and accompanied by him proceeded to his apartment. At this time, the police had no knowledge of appellant's existence. Approaching the apartment, Wander informed the police that he had a friend visiting him. When the police arrived, they read the warrant to

Wander and entered. . . . [T]he record does establish that the police announced they had authority to search everything in the apartment and that appellant claimed two suitcases lying on the floor . . . were his. Despite being on notice that the suitcases did not belong to Wander, the police began searching them simultaneously with their initiating a search of the apartment. In one of appellant's suitcases they found a single ounce of marijuana.

"The Commonwealth attempts to justify its search of appellant's suitcases solely on the ground that it was authorized by a valid warrant. It argues that because the suitcases were separated from appellant's person and located within Wander's apartment, they were properly searched. We disagree.

"The search of appellant's suitcase under the authority of the search warrant for Wander's apartment is analagous to those situations in which consent searches have been invalidated because the place or thing searched was in the exclusive control or possession of a nonconsenting party, and the consenting party did not have 'an independent right of his own to consent to the seizure. . . .' *Commonwealth v. Storck*, 442 Pa. 197, 200, 275 A. 2d 362, 364 (1971) [citations omitted]. It is controlled by the same rationale. The reasoning of these 'consent' search cases is that a person cannot waive the Fourth Amendment rights of another with respect to property owned or possessed by that other person."

In my view, the instant case is controlled by *Platou*. Despite Wander's control over the premises, Platou did not lose his fourth amendment right to privacy. In the instant case, Miss Bubb knew that her niece and her husband used the barn and had seen their friends in the area of the barn. She could infer, therefore, that the footlockers and cartons were not abandoned property. That is, boxes and footlockers stored in a barn loft, by their nature,

show that their owner has an expectation of privacy concerning the contents. Further, appellant's view was not unreasonable. He had entered into a financial arrangement with the niece's husband, legally on the premises, to store the boxes. *Katz v. United States,* 389 U. S. 347 (1967).

The Majority attempts to distinguish *Platou* from the instant case as follows: "The holding of *Commonwealth v. Platou,* [supra], is inapposite in that Miss Bubb did not know who might be the owner of the cartons, footlockers and material. Where such knowledge is lacking, it is unreasonable to expect the police to be able to frame a search warrant." (Slip opinion at 3). This is simply not true, provided, of course, that the police have probable cause to search.[1] Rule 2005, Pa. R. Crim. P., provides that: "Each search warrant shall:

"(a) specify the date and time of issuance;

"(b) identify the property to be seized;

"(c) name or describe with particularity the *person or place* to be searched; . . . ." See also, *Commonwealth v. Kaplan,* 234 Pa. Superior Ct. 102, A.2d (1975). That is, the police may procure a warrant despite the fact that they do not know the owner of the suspected contraband. In the instant case, the police could have obtained a warrant by showing probable cause to suspect that the boxes and footlockers contained marijuana; they were not required to swear that appellant owned the contraband.

Therefore, I would reverse the judgment of sentence and order a new trial.

SPAETH, J., joins in this Dissenting Opinion.

1. Under the facts of the instant case, it is not necessary to determine whether the police in fact had probable cause to search appellant's belongings.

APPENDIX D.

IN THE
COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

CRIMINAL

No. 1974 - 265

COMMONWEALTH

v.

BRUCE LATSHAW

Opinion

CAMPBELL, *P. J.*

On September 5, 1974, this Court refused defendant's application to suppress evidence and found the defendant guilty of Possession of Marijuana With Intent To Manufacture Or Deliver in a non-jury trial. Defendant's motion for a new trial and in arrest of judgment is now before us. Defendant's target is the Court's refusal to suppress the fruits of the search and seizure. From the testimony relating to the search and seizure and the following non-jury trial, we find the following facts.

Minnie Bubb was the sole owner of a set of farm buildings which were not used as part of a farming operation. The buildings consisted of a large two-story farmhouse, a woodshed, a shanty, and a large barn, the latter located some 25-30 yards distance from the house. Her niece was married to Robert Hinds, and she rented to Mr. and Mrs. Hinds the one side of the farmhouse for $100 per

month, which included utilities. Minnie Bubb resided in the remainder of the farmhouse.

Minnie Bubb never at anytime made any lease, either oral or written, with respect to the barn or any of the outbuildings, but she did from time to time grant permission for relatives to store articles and to utilize lower portions of the barn. Mrs. Hinds kept a horse in the barn prior to her marriage, and, following her marriage, they kept a goat there and parked their car under the barn. Minnie Bubb also gave permission to a brother to store his tractor, lumber, and a lawn mower in the barn, and allowed him to park his truck outside the barn. She never at anytime gave permission to anyone to use the loft, the haymow, or the upper portion of the barn.

Robert Hinds was a friend of the defendant, Bruce Latshaw. Without the knowledge, permission or consent of Minnie Bubb, Robert Hinds gave permission to Bruce Latshaw to store and process shipments of marijuana in the hayloft of the barn for $75.00 a shipment. The presence of the defendant and his co-conspirators was explained to Mrs. Bubb by informing her that they were college students who were planting a garden and were doing something for a term paper, and that their presence was necessary as a college requirement.

A week before the search and seizure occurred, Minnie Bubb noticed on her brother's truck, parked outside of the barn, greenish material resembling weeds, which she suspicioned to be marijuana. She discussed it with her brother and then called in her sister-in-law, Dora Bubb, who climbed into the loft and discovered a brown paper bag which further confirmed their suspicions, and they then called the police to investigate. Not only did Minnie Bubb give permission to the police authorities to search the area, she actually called them and invited them to do so. The police search which followed uncovered 76 pounds of

cured marijuana in bags, cartons and footlockers and, in addition thereto, the police discovered dust masks, a 100-lb. hanging scale, a pair of shears, nets for drying marijuana, a pair of binoculars, masking tape, cord and other processing equipment.

Defendant asks us to suppress the introduction of the contraband seized in the search for the reason that the warrantless search was illegal. We cannot agree for several reasons.

First, Minnie Bubb was the sole owner of the barn in question and there is no evidence whatsoever that she ever at anytime granted anyone permission to use the loft or upper part of the barn for any purpose. Therefore, she alone would have the right to use and exercise control over that portion of the barn, and she alone would have the right to give consent to a search thereof.

Secondly, Robert Hinds, who had been given permission to keep a horse, a goat, and to park his automobile under the lower part of the barn, had no authority whatsoever to make any clandestine deal with the defendant to utilize the hayloft in the upper portion of the barn. Clearly the defendant is a trespasser who could have been evicted at any time by the owner, Minnie Bubb. Under these circumstances the defendant would have no standing to raise any constitutional rights issue with respect to the search and seizure in question.

Lastly, even if we assume that the permission which Minnie Bubb gave to Robert Hinds to house his animals and park his car on the ground floor of the barn gave him permission to likewise use the remainder of the barn, under no stretch of the imagination could this be construed as a sole right in Robert Hinds to so use the barn. The record is quite clear that Minnie Bubb, in addition to giving other relatives the right to store articles in the barn, never sur-

rendered her right and authority to do the same when necessity arose. Pennsylvania has adopted the rule that one having joint control over a protected area may give his consent to a warrantless search of that area and that consent will be binding upon other joint users: see *Commonwealth v. Kontos, App.*, 442 Pa. 343 (1971); *U. S. v. Matlock*, 415 U. S. 164, 39 L. Ed. 2d 242, 94 S. Ct. 988.

Our research discloses no instances where a search has been held illegal under the facts and circumstances set forth herein. We therefore enter the following

Order

AND Now, April 8, 1975, defendant's motions for a new trial and arrest of judgment are refused, and the defendant is ordered to appear for sentencing at the direction of the District Attorney.

By THE COURT:

R. PAUL CAMPBELL
P. J.

APPENDIX E.

Supreme Court of the United States

No. A-583

BRUCE A. LATSHAW,
Petitioner,

v.

UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari.

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 3, 1979.

WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 27th day of December, 1978.